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The Owned Public Domain: The Constitutional Right Not to Be Excluded - Or the Supreme Court Chose the Right Breakfast Cereal in *Kellogg v. National Biscuit Co.*

Malla Pollack

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The Owned Public Domain: The Constitutional Right Not to be Excluded - Or the Supreme Court Chose the Right Breakfast Cereal in *Kellogg v. National Biscuit Co.*

by
MALLA POLLACK*

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* Visiting Assoc. Prof., Northern Illinois Univ., College of Law.

Introduction

Before the rise of law and economics, the Supreme Court decided several cases involving patent holders' attempts to use trademark doctrines to slow down competitors after the expiration of their utility patents; in each of these cases, the Court enforced a public right to use material in the public domain.¹ To give one famous example, *Kellogg Co. v. National Biscuit Co.*,² the "shredded wheat case," came to the Court after the expiration of a product and process utility patent on that once-innovative breakfast cereal. The Court held that a competitor could freely copy the product's name and its well known pillow-shaped form because both had entered the public domain when the patent expired. While disagreeing on the showing required to allow copying, five United States circuit courts have recently unanimously declined to follow *Kellogg*.

This term, the Court revisits the *Kellogg* issue in *Traffix Devices, Inc. v. Marketing Displays, Inc.*³ This article explains why the Supreme Court got it right the first time.⁴ The issue in *Kellogg* and *Marketing Displays* belongs to the Court's area of greatest expertise: the United States Constitution. The Court has no need to enter the less hospitable arena of economic theory.⁵

My thesis is that Article One, Section Eight, Clause Eight of the United States Constitution⁶ allows⁷ Congress to create

1. See *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111 (1938); *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169, 186 (1896); *Coats v. Merrick Thread, Co.*, 149 U.S. 562, 572 (1893).

2. 305 U.S. 111 (1938).

3. 200 F.3d 929 (6th Cir. 1999), *cert. granted*, 120 S. Ct. 2715 (2000) (No. 99-1571).

4. See also *Amicus Brief [of Malla Pollack] Supporting Petitioner, Traffix Devices, Inc., Traffix Devices, Inc. v. Marketing Displays, Inc.* (U.S. Sup. Ct. No. 99-1571) (presenting this thesis).

5. With all due respect to the law and economics movement, the Supreme Court may be well advised to leave economic theory to others. The point of Justice Holmes' dissent in *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), is that the majority incorrectly "sought to impose a particular economic philosophy upon the Constitution." *College Sav. Bank v. Florida Prepaid Postsecondary Edu. Expense Bd.*, 527 U.S. 666, 691 (1999).

6. "Congress shall have the power . . . To promote the progress of science and useful arts, by securing for limited times to authors and inventors the

individual ownership in intellectual "property" *only* to the extent that such privatization respects the public's constitutional right to the public domain. The public domain is "owned" in inalienable, indivisible common by the public, not the federal government. The form of this ownership is a right not to be excluded. Therefore, neither the courts nor Congress have the power to redraw the public domain's boundaries in pursuit of some now-current economic theory.

The first section of this article discusses the Lockian conception of property, which may stand behind the Constitution. The second provides my suggestion for interpreting the words of the Intellectual Property Clause. The third section explains why the historical background of the "useful Arts" section of the Clause supports my suggested reading. The fourth section explains how this interpretation rationalizes the "Bargain Theory of Patents" assumed in the early Supreme Court cases which are currently being challenged.⁸

I

Lockian Property

Let us start by looking at the most constitutionally relevant theory of property rights, the labor theory of John Locke.⁹ Property is an important constitutional value. As

exclusive right to their respective writings and discoveries." U.S. CONST., art. 1, § 8, cl. 8 ("the Intellectual Property Clause").

7. More correctly, "should be read to allow."

8. While this thesis has interesting ramifications for copyright disputes, I leave that more complex issue for another article.

9. The Framers and ratifiers of the U.S. Constitution assumed a Lockian conception of property. See, e.g., C. B. Macpherson, *The Meaning of Property*, in *PROPERTY: MAINSTREAM AND CRITICAL POSITIONS* 1, 13 (ed. C. B. Macpherson, 1978). But see JOHN DUNN, *THE POLITICAL THOUGHT OF JOHN LOCKE: AN HISTORICAL ACCOUNT OF THE ARGUMENT OF THE 'TWO TREATISES OF GOVERNMENT'* 7 & n.3 (Cambridge Univ. Press paperback reprint 1995) (claiming that "[t]he story of how the *Two Treatises of Government* was causally responsible . . . for the direction of American political theory in the eighteenth century is . . . largely false."); Peter Laslett, *Introduction*, to JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 3, 14 & n.† (Cambridge Univ. Press Student Paperback ed. 1999 print) (arguing that Locke's influence on the American Revolution is generally overrated; while Thomas Jefferson was a Lockian, not many of his contemporaries were). This article, however, requires a property theory. The two main philosophical theories of property in modern discussions are Locke's and Hegel's. See, e.g., Justin Hughes, *The Philosophy of Intellectual Property*, 77 *GEORGETOWN UNIV. L. J.* 287 (1988) (discussing Locke and Hegel). Hegel's views,

Jennifer Nedelsky demonstrates, the Federalists drafted a constitution which undervalued individual, democratic participation in government because they used private property as the paradigm individual right to be protected by the government against majoritarian faction.¹⁰ To understand the constitutional limits, if any, on intellectual property,¹¹ I suggest we begin by trying to understand the background concept of property assumed by the Constitution's drafters and ratifiers.¹² Our first problem is deciding how to read Locke.¹³

Superficially, the Lockian position can be summarized easily. Originally, man is situated in a state of nature¹⁴ where

however, were unavailable at the founding. See 7 FREDERICK COPLESTON, A HISTORY OF PHILOSOPHY 159-62 (paperback ed. 1985) (providing a chronology of Hegel's publications). Madison's most pertinent writing uses what I call a Lockian public domain. See *infra* text accompanying note 67. I, therefore, focus on Locke in this article.

10. See generally JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY (paperback ed. 1994).

[T]he Federalists' focus on protecting property from redistribution and, more broadly, from democratic redefinition, led to a misunderstanding of both the problems and the potential of democracy; and treating the protection of unequal property as the paradigm case of the problem of protecting individual rights in a democracy led to a misconception of the complex relation between democracy and individual autonomy, which is the true problem of constitutionalism. It was thus not property as such, but the effort to protect property and inequality from democratic revision, that has had distorting consequences.

Id. at 3 (stating her thesis).

11. Intellectual property is constitutionally different from other types of property because Congress is empowered to create it.

12. We need to consider "original understanding" first, because the Supreme Court commonly does. See, e.g., *Alden v. Maine*, 527 U.S. 706, 758 (1999) ("We seek to discover, however, only what the Framers and those who ratified the Constitution sought to accomplish . . ."). Second, we need to consider it because learning from the past is preferable repeating old errors. I have not attempted to find out how any specific Framer or Ratifier of the Constitution understood Locke's philosophy. Even accepting "original understanding," such a quest overemphasizes the individual beliefs of specific persons whose papers happen to be preserved, but whose papers may not have been publicly influential during the ratification controversy. My preference, furthermore, is to read the Constitution with careful attention to its actual wording, its amendments, ethical metavalues, and what the words must mean for the current population of the United States to ratify the document.

13. Locke's ambiguity is notorious. See, e.g., DUNN, *supra* note 9, at 5-10.

14. "[T]he State that Nature hath provided." JOHN LOCKE, TWO TREATISES OF GOVERNMENT, 2ND TREATISE, § 27. But see Laslett, *supra* note 9, at 99 n. * ("Locke may be said to have done more than anyone else to found the study of

all is owned in common, including the fruit on the trees.¹⁵ To survive, each man needs to be able to eat pieces of fruit without individually asking permission of every other person,¹⁶ i.e., without the problem of transaction costs. A man who picks an apple obtains individual property in that apple by virtue of the labor involved in picking it.¹⁷ Each man owns his own labor because he owns his own person.¹⁸ Individual appropriation does not harm anyone else because there are as many fruits of equal quality available for every other person to appropriate by also laboring.¹⁹ Because the earth and its fruit are intended to sustain humans, no person may waste fruit by picking so much that some rots.²⁰ Some items, however, are not highly perishable. A person does no wrong by picking a pile of fruit and trading some of "his" or "her" fruit for longer lasting items, such as nuts.²¹ Eventually men²²

comparative anthropology, and he was well aware that the evidence did not demonstrate a 'state of nature' of the sort he described in this political theory.").

15. "[T]he Earth, and all inferior Creatures be common to all Men." *Id.*

16. "And will any one say he had no right to those Acorns or Apples he thus appropriated, because he had not the consent of all Mankind to make them his? . . . If such a consent as that was necessary, Man had starved, notwithstanding the Plenty God had given him." *Id.* § 28.

17. "When did [the picked apples or acorns] begin to be his? . . . And 'tis plain, if the first gathering made them not his, nothing else could. That labor put a distinction between them and common." *Id.*

18. "Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. . . . The Labor of his Body, and the Work of his Hands, we may say, are properly his." *Id.* § 27.

19. Locke wrote:

Nor was this appropriation of any parcel of Land, by improving it, any prejudice to any other Man, since there was still enough, and as good left; and more than the yet unprovided could use. . . . For he that leaves as much as another can make use of, does as good as take nothing at all.

Id. § 33.

20. Locke wrote:

It will perhaps be objected to this, That if gathering the Acorns, or other Fruits of the Earth [automatically] makes a right to them, then any one may ingross as much as he will. To which I Answer, Not so. The same Law of Nature, that does by this means give us Property, does also bound that Property too. God has given us all things richly, [but only to] enjoy. As much as any one can make use of to any advantage of life before it spoils; so much he may by his labor fix a Property in. Whatever is beyond this, is more than his share, and belongs to others. Nothing was made by God for Man to spoil or destroy . . . "

Id. § 31.

21. "And if he also bartered away Plumbs that would have rotted in a Week, for Nuts that would last good for his eating a whole Year, he did no injury; he

tacitly agreed to use non-perishable tokens, i.e., money, as a substitute means of exchange.²³ The use of money allows some persons to obtain very large individual holdings without unacceptable spoilage.²⁴

Let us look at a few rival interpretations of this deceptively simple-sounding theory – not to understand Locke's philosophy *per se*, but to understand the "property" assumed by the Constitution.

A. The Limited Locke

John Dunn's Locke²⁵ (whom I shall refer to as the "Limited Locke") is, above all else, a seventeenth century Calvinist²⁶ with a limited, specific agenda: refuting Sir Robert Filmer's claims of the security and symmetry of authority

wasted not the common Stock." *Id.* § 46.

22. Modern anti-discrimination conventions can only go so far. When God created men, She was only joking, but Locke, the Founders, and their contemporaries assumed She was only empowering the male of the species.

23. Locke wrote:

This is certain That in the beginning, before the desire of having more than Men needed, had altered the intrinsick value of things, which depends only on their usefulness to the Life of Man; or [Men] had agreed, that a little piece of yellow Metal, which would keep without wasting or decay, should be worth a great piece of Flesh, or a whole heap of Corn; though Men had a Right to appropriate, by their Labor, each one to himself, as much of the things of Nature, as he could use: Yet this could not be much, nor to the Prejudice of others, where the same plenty was still left, to those who would use the same Industry. . .

LOCKE, *supra* note 14, at § 37. "And thus came in the use of Money, some lasting thing that Men might keep without spoiling, and that by mutual consent Men would take in exchange for the truly useful, but perishable Supports of Life." *Id.* § 47.

24. Locke wrote:

But since Gold and Silver, being little useful to the Life of Man in proportion to Food, Rayment, and Carriage, has its value only from the consent of Men, whereof Labor yet makes, in great part, the measure, it is plain, that Men have agreed to disproportionate and unequal Possession of the Earth, they having by a tacit and voluntary consent found out a way, how a man may fairly posses more land than he himself can use the product of, by receiving in exchange for the overplus, Gold and Silver, which may be hoarded up without injury to any one, these metalls not spoiling or decaying in the hands of the possessor.

Id. § 50.

25. See DUNN, *supra* note 9.

26. See *id.* at 245-61. But see LASLETT, *supra* note 9, at 69 (Locke made use of "rationalist arguments which simply could not be contained in [a] world of Biblical politics.").

relationships.²⁷

Filmer, the Limited Locke's antagonist, argues that the king holds preeminent ownership of all property in his kingdom.²⁸ Point one: God's creation of the world naturally vested full ownership of the world in God.²⁹ Point two: God gave the entire world to one man, Adam.³⁰ Point three: undivided ownership of each political territory has descended from Adam to each sitting monarch.³¹ Political conclusion: the king's underlying ownership authorizes his personal entitlement to take back any desired item of property from any subject at any time, i.e. unlimited power of taxation and eminent domain without compensation.³² Locke accepts Filmer's first two points, but disputes the third.³³

27. See DUNN, *supra* note 9, at 72-73.

28. In English constitutional history, this position can be traced back at least to John Cowell's *The Interpreter*, the pro-monarchical legal dictionary banned by the House of Commons in 1610 during its dispute with James I. See, e.g., G. E. Aylmer, *The Meaning and Definition of "Property" in Seventeenth Century England*, 86 PAST & PRESENT 87, 88-89 (1980) (discussing briefly and listing other sources); William E. Klein, *Parliament, Liberty and the Continent in the Early Seventeenth Century: The Perception*, 6 PARLIAMENTARY HISTORY 209, 211 (1987) (same); see also A Proclamation touching J. Cowell's book called the *Interpreter* (25 March 1610), reprinted in 1 STUART ROYAL PROCLAMATIONS 243 (James F. Larkin and Paul L. Hughes, eds., 1973) (suppressing book). *The Interpreter*, however, did not stay suppressed. Ten editions were printed by 1728 when it was superseded by Jacob's Law Dictionary. See *id.* at 244 n. 2 (note by editors).

Propertie signifieth the highest right that a man hath or can have to any thing; which is in no way depending upon any other mans courtesie. And this none in our kingdom can be said to have in any lands, or tenements, but onely the king in the right of his Crowne. Because all the lands through the realme, are in the nature of fee, and doe hould either mediately or immediately of the Crowne. See *Fee*. This word neuerthelesse is in our common law, used for that right in lands and tenements, that common persons have, because it importeth as much as (*utile dominium*) though not (*directum*).

JOHN COWELL, *THE INTERPRETER* (unnumbered page) (1970 Da Capo Press reprint of 1607 Cambridge ed.).

29. See *id.*

30. See *id.*

31. See *id.*

32. See Robert Filmer, *Patriarchia*, in *PATRIARCHIA AND OTHER WRITINGS* 1-68 (Johann P. Sommerville ed., Camb. Univ. Press 1991); Dunn, *supra* note 9, at 58-76 (discussing Filmer's positions).

33. Locke wrote:

I will not content my self to answer, That if it be difficult to make out Property, upon a supposition, that God gave the World to Adam and his Posterity in common; it is impossible that any Man, but one universal Monarch, should have any Property, upon a supposition, that God gave

While the Limited Locke begins with man in the state of nature, this state of nature is a theological construct, not a historical or psychological description; the state of nature is man's position outside history³⁴ as a creation of God. Even in the state of nature, man is obligated by his position as God's creation.³⁵

The Limited Locke's project is limited; he wants to prove that non-monarchical property is protected by more than mere convention. The enemy is non-parliamentary taxation and confiscation of freeholds, not a welfare policy of egalitarian wealth redistribution.³⁶ The Limited Locke has never seen, nor conceived of, any society without unequal property. He is not trying to justify inequality, but we have no evidence that he finds inequality offensive.³⁷ Labor is central because each man's definitive moral duty is to work at the particular "calling" given him by God.³⁸ The prohibition against "waste" is also theological. God is both benign and efficient: all He created was created for a purpose; man sins if he uses anything in contradiction to divine purposes.³⁹ The Limited Locke seems to mean the anti-waste provision literally; he simply ignores the tension between the "as much and as good" proviso and major inequalities in wealth in post-monetary society.

the World to Adam, and his Heirs in Succession, exclusive of all the rest of his Posterity.

LOCKE, *supra* note 14, at § 25.

34. See generally J. G. A. POCOCK, *THE MACHIAVELLIAN MOMENT* (Princeton Univ. Press paperback ed., 1975) (describing development of theory of history); *id.* at 3-9 (explaining the central premise of the book to be how western man developed the concept of "history" to replace the ancient Greek prioritizing of the unchanging and the medieval prioritizing of the apocalyptic).

35. See DUNN, *supra* note 9, at 97-98. Locke starts here because his opponent, Filmer, starts with the Creation, thus trumping the standard "historical" Whig arguments from the Ancient Constitution. See *id.* at 101. The existing version of *Two Treatises* does not discuss the English history arguments Filmer made elsewhere. A large part of Locke's original manuscript, however, was lost before the first printing. The "lost" manuscript may have been destroyed to protect Locke from punishment for treason, as a discussion of the ancient constitution would have been politically dangerous before the Glorious Revolution. See LASLETT, *supra* note 9, at 76-78 (raising and discounting this possibility).

36. See *id.* at 216; see also LASLETT, *supra* note 9 at 107 (Locke's property theory is not fully developed because his only aim was to delegitimize taxation).

37. See DUNN, *supra* note 9, at 240.

38. See *id.* at 218-25.

39. See *id.* at 95.

This Limited Locke is a convincing historical figure, but he does not answer my questions about the public domain. He would be sufficient, however, to support the Founders' slogan "[t]axation without representation is tyranny."⁴⁰

B. The Proletarian Locke

Locke can be read as a forerunner of Marx⁴¹ in his emphasis of the claim of individual self-ownership:

Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. *This no Body has any Right to but himself.* The Labor of his Body,⁴² and the Work of his Hands, we may say, are properly his.

If no person can own another person's labor, Locke supports Marx: working people are entitled to the value their labor adds to the raw materials worked upon, not the squeezed-down market value after the capitalist has appropriated all the surplus.⁴³ In terms of land, Locke says ownership is justified by the labor which makes land more productive.⁴⁴ So why, as Proudhon famously asks, does the

40. A DICTIONARY OF LEGAL QUOTATIONS 166 (Simon James & Chantal Stebbings eds., 1987) (ascribed to James Otis); see also TOM PAINE, RIGHTS OF MAN, *reprinted in* TOM PAINE, THE SELECTED WORKS OF TOM PAINE & CITIZEN PAINE 96, 100 (Thomas Field, ed., Modern Library ed. 1946) ("In England it is said that money cannot be taken out of the pockets of the people without their consent.").

41. See, e.g., C. H. Driver, *John Locke*, in THE SOCIAL AND POLITICAL IDEAS OF SOME ENGLISH THINKERS OF THE AUGUSTAN AGE 69, 91 (F. J. C. Hearnshaw ed., 1967 facsimile reprint of 1928 ed.) (suggesting that Locke's labor theory of property led to Karl Marx.).

42. LOCKE, *supra* note 14, at § 27 (emphasis added).

43. See 1 KARL MARX, CAPITAL, *reprinted in* PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 64, 76 (C. B. Macpherson ed. 1978).

Political economy confuses on principle two very different kinds of property, of which one rests on the producers' own labor, the other on the employment of the labor of others. It forgets that the latter not only is the direct antithesis of the former, but absolutely grows on its tomb only.

See *id.* See also PIERRE-JOSEPH PROUDHON, WHAT IS PROPERTY? 88 (Donald R. Kelley & Bonnie G. Smith ed. & trans., Cambridge Univ. Press 1994) ("Here is my proposition: *The laborer retains, even after receiving his wages, a natural right of property in the thing which he has produced.*").

44. Locke wrote:

But the chief matter of Property being now not the Fruits of the Earth, and the Beasts that subsist on it, but the Earth it self; as that which takes in and carries with it all the rest: I think it is plain, that Property in that too is acquired as the former. As much Land as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is

first worker hold the land in perpetuity? Why does government force later tillers and improvers to settle for bare subsistence wages paid by the idle decedents of the original tillers?⁴⁵ The “as much and as good” proviso, furthermore, could support the proposition that each member of each generation is entitled to an equal opportunity to the commons.

No one, however, seemingly suggests that the John Locke of seventeenth century England proposed any major social upheaval. The “egalitarians” roughly contemporary with Locke were the Levelers. They went no further than asking for a change in the property test for the franchise; they wanted the vote extended to all adult males who were neither wage laborers, criminals, nor alms takers.⁴⁶ The 1787 United States Constitution is not a socialist tract; the Federalist position, in part at least, was a negative reaction to debtor relief laws.⁴⁷

C. The Acquisitive Locke

C. B. Macpherson posits an Acquisitive Locke, an apologist for unlimited private appropriation, an almost perfect spokesperson for the accumulation of capital for investment. The Acquisitive Locke, *per* Macpherson, is providing a justification for the unlimited, individual accumulation of property in land and money for use as capital in a market economy.⁴⁸ Macpherson's most important

his Property. He by his Labor does, as it were, inclose it from the Common.

LOCKE, *supra* note 14, § 32.

45. See PROUDHON, *supra* note 43, at 86-90. Cf. William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907 (1997) (arguing that extensions of the copyright term are not congruent with the constitutional policy of rewarding and encouraging intellectual labor; extensions reward the “idle rich”).

46. See [Levelers'] *Petition of January 1648*, reprinted in C. B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 124 (Oxford Univ. Press paperback ed. 1964); see generally *id.* at 107-59 (discussing Leveler movement). Tully reads Locke's position as implicitly going further: each man has property in himself; property is the traditional, English basis of the franchise; therefore, every man is entitled to the franchise. Locke did not, however, expressly make this argument. See JAMES TULLY, *A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES* 173-74 (1980).

47. See, e.g., U.S. CONST. art. 1, § 10, cl. 1 (prohibiting states from making paper money legal tender); NEDELSKY, *supra* note 10, at 147-49.

48. See MACPHERSON, *supra* note 46, at 107 (“Locke saw money as not merely a medium of exchange but as capital. . . . [Capital is acquired] to beget

moves are to read both the spoilage and the “as much and as good” provisos completely out of monetized society. He also deletes any limitation on acquiring property through others’ labor. Macpherson’s view of the spoilage limitation is clearly supported by the text. His other arguments, however, are questionable. His final conclusion is, I believe, extremely anachronistic – which may not defeat it as a suggestion for learning from Locke’s philosophical works, but probably disqualifies it as a sensible backdrop to the 1787 Constitution.

Macpherson defuses the Proletarian Locke by focusing on the following passage:

Thus the Grass that my Horse has bit; *the Turfs my Servant has cut*; and the Ore I have digg’d in any place where I have a right to them in common with others, become my Property, without the assignation or consent of any body. The labor that was mine, removing them out of that common state they were in, hath fixed my Property in them.⁴⁹

To Macpherson, this passage asserts that the employer owns the labor of his paid human servant in the same way that he owns the actions of his horse. Locke’s text, however, is barren of discussion. Locke denied that the human right in one’s self included the right to commit suicide; self ownership does not go that far.⁵⁰ Locke, however, does not set the exact boundary of self-ownership. Macpherson notes this tension between capitalist, economic and traditional Christian values, but merely reiterates that Locke mentions no problem.⁵¹ To a reader with a legal eye, the phrase, “the Turfs my Servant has cut,” seems analogous to over-stated dicta. Locke developed the personal labor theory of property too extensively for such a throw-away line to disestablish the theory’s ramifications – even if the author has overlooked one of them. Rousseau’s *Discourse on Inequality*, furthermore, was published in 1755;⁵² ratifiers of the 1787 Constitution and its first ten

further capital by profitable investment.”). But see TULLY, *supra* note 46, at 149 (explaining the anachronistic nature of reading “capital accumulation” into Locke).

49. LOCKE, *supra* note 14, § 28 (emphasis added); see MACPHERSON, *supra* note 46, at 214-20 (discussing § 28).

50. LOCKE, *supra* note 14, § 135.

51. See MACPHERSON, *supra* note 46, at 219-20.

52. Jean-Jacques Rousseau was “catapulted into the public eye” by his two discourses. The *Second Discourse* was written for the 1753 essay competition of

amendments may have noticed this tension in Locke's text.⁵³

Macpherson is even less convincing about the "as much and as good" proviso, which he declares was trumped by the tacit consent to use money. Macpherson reads Locke's chronology as: (a) state of nature with exchange by barter of useful goods where possessions are limited by two provisos; (b) state of nature with money; money bypasses spoilage and accumulation is unlimited by "as much and as good" proviso; and finally, (c) organized society subject to conventional property rules promulgated by governments.⁵⁴ Macpherson's chronology relies on the italicized language in the following passage:

This partage of things, in an inequality of private possessions, men have made practicable *out of the bounds of Societie, and without compact*, only by putting a value on gold and silver and tacitly agreeing in the use of Money. For in Governments the Laws regulate the right of property, and the possession of land is determined by positive constitutions.⁵⁵

Macpherson's reading is possible, but seems to ignore (i) the use of "For" to begin the second quoted sentence; (ii) the possible meaning of "out of the bounds of Societie" here as merely "without express compacts creating formal

the Dijon Academy on the set topic "What is the source of inequality among men and is it authorized by natural law?" See *id.* at 18. Rousseau's entry "firmly established Rousseau as a thinker to be reckoned with." *Id.* at 4-5. The work was published in 1755 in Geneva. See JEAN-JACQUES ROUSSEAU, DISCOURSE ON THE ORIGIN AND FOUNDATIONS OF INEQUALITY AMONG MEN, *reprinted in* THE FIRST AND SECOND DISCOURSES 77, 77 (Roger D. Masters ed., St. Martin's Press paperback ed. 1964) (reproduction of original title page). Rousseau considered man to be social, happy, and equal in the state of nature. Inequality, war, and oppression were creations of society. *Id.* at 101-02, 140-42, 151-52, 180-81.

53. Macpherson's reading overlooks Locke's distinction between "slaves," who are forced to work (an action Locke condemns), and "servants." See LOCKE, *supra* note 14, § 85; JOHN LOCKE, TWO TREATISES OF GOVERNMENT, 1ST TREATISE, § 42 [hereinafter *1st Treatise*]. But see LASLETT, *supra* note 9, at 105-06 (asserting that section 130 of the First Treatise shows that slavery "in no way perturbs" Locke; I consider this an extreme over reading of section 130, which merely answers Filmer's patriarchal construction of a specific biblical story). Tully further defuses the servant problem by asserting that Locke is assuming a seventeenth century model of the servant hired for specific service, a model allegedly replaced by "capitalist" wage-labor only in the "late eighteenth century." TULLY, *supra* note 46, at 136-44. The alleged point of change, however, is too close to 1791 to comfort someone interested in how the Founders' generation read Locke.

54. See MACPHERSON, *supra* note 46, at 210-11.

55. See LOCKE, *supra* note 14, § 50 (emphasis added).

governments,” and (iii) the atemporal nature of Locke’s state of nature. The claim in Locke’s text, that inequality of possession is logically separable from the existence of formal governments, seems a weak support for removing the main proviso Locke uses to legitimize private property, especially as the historical Locke’s agenda was a dispute between the monarch and the rest of society *en masse*.

Macpherson’s other support is logically fallacious. Macpherson reads the “as much and as good” proviso as equivalent to the natural (and God given) right to use the fruits of the earth for personal subsistence. Since cultivated land produces much more than uncultivated land, persons who cultivate it may equitably keep most of it; all the paid laborer is entitled to is the bare subsistence available from unimproved land, the type of land available “in the beginning” of the state of nature.⁵⁶ Macpherson’s argument is not convincing because Locke’s “enough and as good limitation” is not based solely on the right of sufficiency; it is required because all humans have the right to appropriate from the common through labor:

Nor was this appropriation of any parcel of Land, by improving it, any prejudice to any other Man, since there was still enough, and as good left; and more than the yet unprovided could use. So that in effect, there was never the less left for others because of his inclosure for himself. For he that leaves as much as another can make use of, does as good as take nothing at all. No Body could think himself injur’d by the drinking of another Man, though he took a good Draught, who had a whole River of the same Water left him to quench his thirst. And the Case of Land and Water, where there is enough of both, is perfectly the same.⁵⁷

Nature/God, however, gave man the world, not just for “the Support,” but also for “the Comfort” of men’s] being; “to make use of it to the best advantage of Life, and convenience.”⁵⁸ Historically, furthermore, the labor that rendered the improved land more productive seems largely the labor of the non-landowning class.

Macpherson correctly points out the upper-class seventeenth century’s standard assumptions that poor persons are not full members of society, lack complete

56. See MACPHERSON, *supra* note 46, at 211-14.

57. LOCKE, *supra* note 14, § 33.

58. *Id.* § 26.

rationality, are not entitled to political power, and survive on a bare subsistence. He correctly points to the Protestant ethic's occasional conflation of money and merit.⁵⁹ These uncontested points, however, merely show why Locke may have been unaware of the tensions we see inside his explication.⁶⁰ The platitudinous nature of Locke's "errors" supports no more than the Limited Locke.⁶¹ It provides no reason for Americans in the late eighteenth century not to notice Locke's internal tensions. Whatever the Federalists who drafted the 1787 Constitution personally believed about a natural aristocracy, the equality rhetoric of the documents they published eroded the popular notion of the quality's importance.⁶²

D. The Located Locke

I recommend the Located Locke explicated by James Tully.⁶³ Tully places Locke in linguistic, philosophical, and historical sequence. The Located Locke preexisted our assumed dichotomy between "private" and "common" property,⁶⁴ as well as our assumed dichotomy between "property" and "rights."⁶⁵ Locke's terms, furthermore, grow from technical distinctions of Roman law, distinctions with which we are no longer familiar.⁶⁶ To understand the founding

59. See MACPHERSON, *supra* note 46, at 221-32.

60. As Macpherson points out, Locke argues on the contrary assumptions that pre-social men are rational and that pre-social men are irrationally quarrelsome. *Id.* at 238-46.

61. As Laslett agrees:

Locke is, perhaps, the least consistent of all the great philosophers, and pointing out the contradictions either within any of his works or between them is not a difficult task. Sometimes it seems quite clear that he was unconscious of his inconsistency, at other times . . . he himself realized his dilemma, but was unable to find a solution.

LASLETT, *supra* note 9, at 82.

62. See, e.g., GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION 172-77* (Vintage Books paperback ed. 1993); see also *id.* at 184 ("With the post-revolution republican culture talking of nothing but liberty, equality, and independence, even hired servants eventually became hard to control.").

63. See TULLY, *supra* note 46.

64. See, e.g., *id.* at x.

65. See, e.g., *id.* at 7.

66. See, e.g., *id.* at xiii-xiv. Some of these linguistic distinctions were purposely jettisoned by a few natural law writers who shortly predated Locke, thus adding to the difficulty of clearly expressing certain arguments. See *id.* at

generation's "property," we need to understand Locke's references for his terms; 1787 is linguistically closer to Locke than 2000 is.

The linguistic tie between Locke and the Founders is evident, for example, in Madison's often quoted essay *Property*. Madison shares Locke's view of property as encompassing natural rights.

In its larger and juster meaning, [property] embraces every thing to which a man may attach a value and have a right; and which leaves to everyone else the like advantage.

... a man's land, or merchandize, or money is called his property.

... a man has a property in his opinions and the free communication of them.⁶⁷

This Madisonian statement also shadows Locke by defining "property" as "leav[ing] to everyone else the like advantage," an echo of the main Lockian proviso and, as discussed below, of central importance to the Located Locke. Let us, therefore, explicate the Located Locke.

The Located Locke begins with the Christian and natural law assumptions that man's proper behavior and moral limits are teleologically bound. While reaching heaven is one goal/purpose of mankind, another is sustaining the physical welfare of all mankind in this world.⁶⁸ Both the respect for

68-77 ("Grotius has divested himself of the terminology in which he could discuss [traditional natural law and Lockian] common property." Pufendorf followed Grotius' lead.).

67. JAMES MADISON, *Property*, 29 Mar. 1792, reprinted in I THE FOUNDERS' CONSTITUTION 598-99 (Philip B. Kurland & Ralph Lerner eds., University of Chicago Press 1987) (original emphasis deleted). At least one scholar has asserted this publication was "extraordinary" and "virtually unprecedented." See MICHAEL KAMMEN, *The Rights of Property, and the Property in Rights*, reprinted in LIBERTY, PROPERTY AND THE FOUNDATION OF THE AMERICAN CONSTITUTION 1, 11 (Ellen Frankel Paul & Howard Dickman eds., 1989); see also NEDELSKY, *supra* note 10, at 21-22 (labeling this usage of "property" to include rights "atypical" in Madison's writings). Similar positions, however, seem to have been advanced in England by the mid-seventeenth century, see, e.g., Alan Craig Houston, "A Way of Settlement": *The Levelers, Monopolies and the Public Interest*, 14 HIST. OF POL. THOUGHT 381 (1993) (describing similar concepts as common background in England around 1640 and asserting that on these points the Levelers' uniqueness dealt only in the use of "monopoly" analogies), and were commonly used by the ratifying generation. See John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49 (1996) (arguing that Madison saw free speech as property, but proving that Madison, and other Founders, predated the modern rights/property dichotomy).

68. See TULLY, *supra* note 46, at 175-76.

God's creations and the natural right of sustenance individually prove⁶⁹ that the world was originally owned in common by all mankind.⁷⁰ As with the Limited Locke, this "originally" is not historical; "origin" or "cause" in the Located Locke refers to teleological causation.⁷¹

The Located Locke's "property" is a wide term including rights.⁷² Locke's use is neither confused nor ambiguous. He expressly defines a property claim as a claim to inclusion; "x owns y" means that x has a right not to be excluded from the use of y;⁷³ the phrase includes, but is not limited to, situations where x can exclude all others from y.⁷⁴ Locke does not see the right to exclude others as the central stick in a bundle of property rights. Locke's common ownership, furthermore, is not equivalent to the usage we have inherited from Grotius and Pufendorf; these natural law philosophers held that the world was "common" in the sense that no individual had a right to exclude others – an unowned public domain. Their usage was, however, a collapse of distinctions made by earlier natural law philosophers. Locke uses the older meaning. To Locke, "common" requires two elements: (i) no individual has a right to exclude all others; and (ii) each member of the commonality has a claim right to be included in the common – a right not to be excluded.⁷⁵ This is the ownership right that I claim for all in the public domain.

A corresponding difference results in the definition of "justice." In a world of unowned commons, justice is rendered when each man receives his own. In a world of owned commons, justice also requires that each man receive his

69. Locke agrees with the basic assumption of St. Thomas Aquinas that natural law and Revelation reach the same conclusions. See *id.* at 68.

70. See LOCKE, *supra* note 14, §§ 25, 26; TULLY, *supra* note 46, at 60.

71. See TULLY, *supra* note 46, at 19-22 (explaining that in Locke's "workmanship" theory of understanding, something's "cause" is its essence or "cause of being.").

72. See *id.* at 112-16.

73. Property is something "[t]he nature whereof is, that without a Man's own consent it cannot be taken from him." LOCKE, *supra* note 14, § 193. As Tully explains, this definition removes the need to discuss a wider and a narrower sense of "property." See TULLY, *supra* note 46, at 110. But see LASLETT, *supra* note 9, at 100-03 (asserting that Locke has at least two different definitions of "property"); see also Madison, *supra* quoted text accompanying note 67 (discussing narrower and wider definitions of "property").

74. See TULLY, *supra* note 46, at 114-16; LOCKE, *supra* note 14, § 173.

75. See TULLY, *supra* note 46, at 68-91.

due, i.e. that to which he is entitled to fulfill his "function" or "purpose" – including a sufficiency of things necessary for preservation.⁷⁶ Consider Tully's analogy to public transportation. Every person who pays the fare (labors) has the right to get on the bus which is held in common by the community. If a common is an absence of the right to exclude, once all benches are occupied, the next person boarding may not enter. If a common is a right not to be excluded, the next person may require earlier passengers to put their baggage on the floor or to move closer together so that he can board.⁷⁷

The Located Locke argues that, in the state of nature, mankind shared the commons without governments by following two provisos: no waste, and leave enough and as good for everyone else. Each person acquired a "use right" in the products and improved land⁷⁸ produced by that person's labor exerted on natural land and material – a model of ownership close to English sixteenth century land law.⁷⁹

76. See *id.* at 84-85. Currently, I am not disputing the ruling interpretation of the United States Constitution as providing only negative rights against the government. See e.g., Frank Michelman, *Tutelary Jurisprudence and Constitutional Jurisprudence*, in *LIBERTY, PROPERTY, AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT* 127 (Ellen Frankel Paul & Howard Dickman, eds. 1990 paperback ed.) (discussing property's place in the dispute over negative and positive constitutional rights). I acknowledge that the negative rights Constitution is inconsistent with this aspect of Locke. This article makes a much narrower argument about the relevance of Locke's position to one clause in the Constitution, the Intellectual Property Clause.

77. See TULLY, *supra* note 46, at 67-68.

78. Locke accepted Francis Bacon's theory that when an agent worked on some *res*, that agent transformed the *res* into some new entity. See TULLY, *supra* note 46, at 117. This (to me incredible) theory allowed Locke to bypass our enormous problem of quantifying the amount of ownership rightfully acquired for some quantum of labor added to a preexisting substratum. We have to answer Nozick's question: if a man pours a glass of tomato juice into the ocean, does the man lose his tomato juice or does he acquire the ocean? See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 174-75 (1974).

79. See TULLY, *supra* note 46, at 125-30. In many situations, common ownership (in Locke's sense) has proven viable. See, e.g., CARL JOHAN DAHLAM, *THE OPEN FIELD SYSTEM AND BEYOND: A PROPERTY RIGHTS ANALYSIS OF AN ECONOMIC INSTITUTION* 86-141 (1980) (providing economic justification of medieval open field system of agriculture); HENRY SUMNER MAIN, *VILLAGE-COMMUNITIES IN THE EAST AND WEST* (London, John Murray 1871) (discussing several common ownership systems); ELINOR OSTROM, *GOVERNING THE COMMONS* (Cambridge Univ. Press 1990) (same); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. OF CHI. L. REV. 711, 711 (1986) (same). If modern economic theory "proves" that commons are "always" tragic, fact shows the limitations of the theory. Zeno, similarly,

Tully's next important analytical concern is money. The state of nature functions without government or strife because each person takes only what he actually uses. Every person who labors, therefore, can obtain use rights enough for both sustenance and convenience. Money, however, introduces evil into the world; men start desiring things merely to hoard them. Hoarding is an unnatural, immoral action. When hoarding starts, hoarders no longer leave as much and as good for others. Therefore, since the natural system has broken down, men must institute governments.⁸⁰ Under governments, property rights are entirely conventional. A man owns whatever the government-instituted ownership rules support. The government has wide discretion in setting up specific property rules, but is still limited by (a) the justice rule not to take from someone any property acquired under the government-created conventional rules, and (b) the functional, natural requirement that society ensure a sufficiency of material needs to each person.⁸¹ If any government breaks these rules, the people have a right of revolt.⁸²

The Located Locke, therefore, is not justifying any specific, conventional property system, not even the then-current English ownership system.⁸³ The Located Locke is not justifying major inequalities of wealth,⁸⁴ the invisible hand's beneficence,⁸⁵ or the motive of narrow self interest leading to acquisitiveness.⁸⁶ Property remains tied to function throughout; property's function is not individualistic; property's function is to provide sustenance and convenience to all humankind, who are equal in having rights.⁸⁷ The

"proved" to pre-calculus mathematicians that Achilles could not overtake a tortoise. See 7 COPLESTON, *supra* note 9, at 56-58 (discussing Zeno of Elea's paradoxes on motion).

80. See LOCKE, *supra* note 14, §§ 37, 47-50.

81. The required inclusion, however, is now limited to each separate nation. Common rights no longer exist as to the whole world. See *id.* § 45.

82. See *id.* §§ 135, 145 (supporting the last two propositions); see also TULLY, *supra* note 46, at 145-67 (supporting entire paragraph in text).

83. See TULLY, *supra* note 46, at 100.

84. See *id.* at 101-02, 163.

85. See *id.* at 149, 161 (asserting that concepts of an economic sphere separate from the political and of a self-regulating market were simply absent from 17th century English thought).

86. See *id.* at 103-04.

87. See LOCKE, *supra* note 14, § 5; see TULLY, *supra* note 46, at 99.

echoes in the Declaration of Independence and the Constitution are unmistakable.

II

A Lockian Reading of the Intellectual Property Clause

We cannot interpret the Intellectual Property Clause with only the minimal existing documentation of the 1787 Constitutional Convention and the ratifying controversies.⁸⁸ We are, therefore, left with the words themselves.

Assuming that the Founders' generation read the Intellectual Property Clause against the doctrines of Locke, the only Locke who reaches our issue is the Located Locke. Let us, therefore, ask what the words of the clause mean if read against the property theory of Locke (Located).

Congress shall have the power . . . To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.⁸⁹

Congress is given a power to "secure" rights to certain individuals. To the extent that such powers are equivalent to "patents in inventions," this rejects the English location of the power with the monarch (the executive).⁹⁰

Authors' and Inventors' rights to exclude do not exist without optional Congressional action. Congress has the power, but is not required to act. "Secure" could be read to imply that authors and inventors already have such rights; Congress is merely empowered to make these pre-existing rights safe.⁹¹ The Supreme Court, correctly, has refused this

88. See, e.g., Malla Pollack, *Purveyance and Power or Over-Priced Free Lunch: The Intellectual Property Clause as an Ally of the Takings Clause in the Public's Control of Government*, 30 Sw. U. L. REV. (forthcoming 2000); <<http://www.fcsl.edu/purveyance.310.2000.htm>> (providing detailed discussion).

89. U.S. CONST., art. I, § 8, cl. 8.

90. See e.g., Pollack, *supra* note 88, *passim* (discussing the relationship between English patent law and the Intellectual Property Clause); see also, e.g., 1 WILLIAM CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 486-87 (1953) (discussing relocation of patent power).

91. A committee of the Continental Congress created by the Articles of Confederation suggested that the individual states enact copyright legislation. The committee's report does use language arguably supporting a natural rights position "being persuaded that nothing is more properly a man's own than the fruit of his study." 24 JOURNALS OF THE CONTINENTAL CONGRESS 326-27 (1922).

reading.⁹² Dictionaries treat the word 'secure' as ambiguous on the issue of the object's pre-existence of the action.⁹³ The

This argument is unconvincing, because the Constitution's language is carefully different. We have no reason to believe that all ratifiers, or even all highly educated colonials, accepted the natural rights theory of patent or copyright. See, e.g., *Graham v. John Deere*, 383 U.S. 1, 7-10 (1966) (reviewing some documentary evidence of Thomas Jefferson's disagreement with natural rights claim).

92. See *Wheaton v. Peters*, 33 U.S. 591, 661 (1834; mem.) ("[T]he word 'secure,' as used in the Constitution, could not mean the protection of an acknowledged legal right. It refers to inventors, as well as authors, and it has never been pretended . . . that an inventor has a perpetual right, at common law, to sell the thing invented."). The same error on English patent law demonstrates that Madison's statement in the *Federalist Papers* about the Intellectual Property Clause was too unconsidered to be taken very seriously:

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instances of Congress.

THE FEDERALIST NO. 43, at 279 (John Madison) (Modern Library ed., 1937). As for copyright, Madison may have been misled because his available Blackstone was printed before the outcome in *Donaldson v. Beckett*. See John F. Whicher, *The Ghost of Donaldson v. Beckett: An Inquiry into the Constitutional Distribution of Powers Over the Law of Intellectual Property in the United States, Part I*, 9 BULL. COPYRIGHT SOC'Y U.S.A. 102, 133 (1961) (Framers had access only to Blackstone's 4th ed. which was published before *Donaldson*). That edition, however, was not as positive as the *Federalist*:

In the case of *Miller v. Taylor* . . . it was determined (upon solemn argument and great consideration) by the opinion of three judges against one, that an exclusive copyright in authors subsists by the common law. But a writ of error hath been since brought in the exchequer chamber, to take the sense of the rest of the judges upon this nice and important question.

2 WILLIAM BLACKSTONE, COMMENTARIES *407-07. Patterson denies the existence of an author's common law copyright in pre-1709 England. See LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 150 (1968). But see 6 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 379 (1956) ("But it can hardly be doubted that the view taken by the majority of the judges, both in [*Jeffreys v. Boosey*, 4 H.L.C. 815 (1954)] and in [*Miller v. Taylor*, 4 Burr. 2303 (1769), and *Donaldson v. Beckett*, 4 Burr. 2408 (1774)] that [copyright] existed at common law, is historically correct." even though "there are hardly any common law actions for infringement of copyright before the Act of 1709"; the absence of common law cases caused by the existence of better remedies elsewhere.). I do not accept Holdsworth's claim that a right existed at common law in the absence of any decisions, statutes, etc. enforcing or decreeing that right.

93. Following the practice of Chief Justice Rehnquist, *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, C.J., dissenting), I consulted the first American dictionary. The transitive verb "secure" has seven entries:

1. To guard effectually from danger; to make safe . . .

pre-existence reading stumbles, furthermore, on the Convention's decision that a power was needed, as well as on its choice not to require congressional action.⁹⁴

The rights Congress has the power to issue are to be "exclusive." Presumably, this means allowing authors and inventors the right to exclude others.⁹⁵

The rights are to be given to "authors" and "inventors" in "writings" and "discoveries." The Supreme Court has relied on this language to require minimum creativity for a copyright.⁹⁶ The clause does not limit congressional power to pre-existing legal entities known as "patents" and "copyrights." Using the terminology "Authors' Exclusive Rights" ("AERs") and "Inventors' Exclusive Rights" ("IERs") allows us to distinguish the constitutionally allowed entities from whatever entitlements Congress chooses to legislate.⁹⁷

The rights are not to be permanent, but for "limited

2. To make certain; to put beyond hazard. . .

3. To inclose or confine effectively; to guard effectually from escape; sometimes to seize and confine . . .

4. To make certain of payment . . .

5. To make certain of receiving a precarious debt by giving bond, bail . . .

6. To insure, as property.

7. To make fast; as to *secure* a door. . .

NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE n.p. (facsimile 10th ed. 1998) (1823). Johnson's dictionary lists first "To make certain; to put out of hazard; to ascertain." The examples under this definition include many where the object secured does not yet exist, one from John Locke: "Actions have their preference, not according to the transient pleasure or pain that accompanies or follow them here, but as they serve to *secure* that perfect durable happiness hereafter." 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 1732 (reprint ed. Librairie Du Liban 1978) (4th ed. 1773).

94. Compare "Each House shall keep a journal of its proceedings . . ." U.S. CONST. art. I, § 5, cl. 3.

95. Webster gives three meanings for the adjective "exclusive:" (i) "Having the power of preventing entrance," (ii) "Debarring from participation; possessed and enjoyed to the exclusion of others; as an *exclusive* privilege," and (iii) "not taking into the account" . . . "as the general had five thousand troops, *exclusive* of artillery." WEBSTER, *supra* note 93, at n.p. Johnson lists these three in the same order and adds a fourth, "excepting." See 1 JOHNSON, *supra* note 93, at 682.

96. See *Feist Publications, Inc. v. Rural Tel. Serv.*, 499 U.S. 340, 346 (1991) ("In two decisions . . . this Court defined the crucial terms, 'authors' and 'writings'. . . these terms presuppose a degree of originality.").

97. See Malla Pollack, *Unconstitutional Incontestability?*, 18 SEATTLE U. L. REV. 259, 290-91 (1995).

times." The Supreme Court agrees.⁹⁸

Congress' power is constrained by the preliminary phrase, "to Promote the Progress of Science and the Useful Arts." The Supreme Court considers this limitation to be integral to the requirements that materials protected by patent and copyright statutes must meet minimal requirements.⁹⁹ The Constitution commonly mentions rights in order to assign limits.¹⁰⁰ The Court is loathe to label any words in the Constitution "mere surplusage."¹⁰¹

The Court has yet to explain what these textual limits imply about the public domain. I suggest that the Clause invokes the Public Domain as a Lockian common: a domain from which each individual has the right not to be excluded.

First, why does the Clause state that Congress may give certain individuals "exclusive rights"? The phrasing is odd unless the default position, the status if Congress chooses not to act, is that no one may be excluded.

Second, what is Congress required to promote with these rights to exclude? Answer: "the Progress of Science and the Useful Arts."¹⁰² The Court has consistently read this to mean

98. See, e.g., *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989) ("Congress may not create patent monopolies of unlimited duration."); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("the limited copyright duration required by the Constitution"); *Pennock v. Dialogue*, 27 U.S. 1, 16-17 (1829) (Constitution "contemplates . . . that this exclusive right shall exist but for a limited time."); see generally Pollack, *Unconstitutional Incontestability*, *supra* note 97, at 274-87 (discussing at length the meaning of "limited times" in the Intellectual Property Clause).

99. See, e.g., *Feist*, 499 U.S. at 349 (stating that facts may not be protected by copyright because "[t]he primary objective of copyright is . . . 'to promote the Progress of Science and useful Arts'"); *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966) ("Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must 'promote the Progress of . . . useful Arts.'").

100. See 1 CROSSKEY, *supra* note 90, at 486-87. See also *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 471 (1982) (Congress may not bypass the "uniformity" requirement in the Bankruptcy Clause by appealing to the Commerce Clause).

101. See *Carter v. United States*, 120 S. Ct. 2159, 2165 (2000) (rejecting proffered reading of statute because "extra clauses in subsection (b) 'cannot be regarded as mere surplusage'" (*quoting* *Potter v. United States*, 155 U.S. 438, 446 (1894))). Some scholars, however, argue that the Framers neither said what they meant, nor meant what they said. See LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 179 (1988) (discussing the First Amendment).

102. This phrase deserves much more clarification, but I leave that to another article.

that the purpose of the exclusive rights granted is to move "inventions" and "writings" into a sphere where all may use them, the public domain.¹⁰³

Third, why is the Clause phrased as a limit on Congress? Congress is limited because the default position is a right of the people – the right not to be excluded. The Constitution is a document protecting the people from government.

None of these textual points *require* that the public domain be a Lockian owned common in which each individual has a claim right not to be excluded, as contrasted to a Grotian unowned common in which material is merely unacquired. Alternatively, the power not granted Congress might have been assumed reserved to the states.¹⁰⁴ However, it seems that a Lockian common is the interpretation which least strains the text.

History, furthermore, supplies several reasons for empowering a Lockian common.¹⁰⁵

III

Inventors' Exclusive Rights and the Lockian Common

The Inventors' right in the Intellectual Property Clause is a descendant¹⁰⁶ of the 1624 Statute of Monopolies.¹⁰⁷ The

103. See, e.g., *Bonito Boats*, 489 U.S. at 151 ("[T]he ultimate goal of the patent system is to bring new designs and technologies into the public domain through disclosure.").

104. Elsewhere, I have argued that the states should be limited by the Intellectual Property Clause despite the Supreme Court's rejection of that claim. See Pollack, *Unconstitutional Incontestability*, *supra* note 97, at 300-326.

105. Another possible justification might be that the Founders' generation was much more familiar with Locke than with Grotius or Pufendorf. This type of research, however, is hostage to the happenstance of preservation, complicated by the multiplicity of other authors who might have popularized ideas without naming the supporting philosophers, and under-counts less scholarly ratifiers.

106. See, e.g., *John Deere*, 383 U.S. at 5 (stating that the Intellectual Property Clause "was written against the backdrop of the practices - eventually curtailed by the Statute of Monopolies - of the Crown granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the public.").

107. The statute, whose full title is "An Act concerning Monopolies and Dispensations with Penal Laws, and the Forfeitures thereof," reads:

Forasmuch as your most excellent Majesty, in your Royal Judgment, and of your blessed Disposition to the Weal and Quite of your Subjects, did in the Year of our Lord God one thousand six hundred and ten, publish in Print to the whole Realm, and to all Posterity, That all Grants

premier colonial exposition of English law, Blackstone's Commentaries,¹⁰⁸ discussed this complex statute as if it ended all "monopolies" except "patents for inventions" granted to inventors.

and Monopolies, and of the Benefit of any Penal Laws, or of Power to dispense with the Law, or to compound for the Forfeiture, are contrary to your Majesty's Laws, which your Majesty's Declaration is truly consonant and agreeable to the ancient and fundamental Laws of this your Realm be it declared and enacted by Authority of this present Parliament, That all Monopolies, and all Commissions, Grants, Licences, Charters and Letters Patents heretobefore made or granted, or hereafter to be made or granted, to any Person or Persons, Bodies Politick or Corporate whatsoever, of or for the sole Buying, Selling, Making, Working, or Using of any Thing within this Realm, or the Dominion of Wales are altogether contrary to the Laws of this Realm, and so are and shall be utterly void and of none Effect, and in no wise to be put in Use or Execution.

. . . .

V. Provided nevertheless, and be it declared and enacted, That any Declaration before mentioned shall not extend to any Letters Patents and Grants of Privilege for the Term of one and twenty Years or under, heretofore made, of the sole Working or Making of any Manner of new Manufacture within this Realm, to the first and true Inventor or Inventors of such Manufactures, which others at the Time of the Making of such Letters Patents and Grants did not use, so they be not contrary to the Law, nor mischievous to the State, by Raising of the Prices of Commodities at home, or hurt of Trade, or generally inconvenient, but that same shall be of such Force as they were or should be, if this Act had not been made, and of none other: (2) And if the same were made for more than one and twenty Years, That then the same for the Term of one and twenty Years only, to be accounted from the Date of the first Letters Patents and Grants thereof made, shall be of such Force as they were or should have been, if the same had been made but for Term of one and twenty Years only, and as if this Act had never been had or made, and of none other.

VI. Provided also, and it be declared and enacted, That any Declaration before mentioned shall not extend to any Letters Patents and Grants of Privilege for the Term of fourteen Years or under, hereinafter to be made, of the sole Working or Making of any Manner of New Manufactures within this Realm, to the true and first Inventor and Inventors of such Manufactures, which others at the Time of the Making such Letters Patents and Grants shall not use, so as also they be not contrary to the Law, nor mischievous to the State, by raising Prices of Commodities at home, or Hurt of Trade, or generally inconvenient: The said fourteen Years to be accounted from the Date of the first Letters Patents, or Grant of such Privilege hereafter to be made, but that the same shall be of such Force as they should be, if this Act had never been made, and of none other.

. . . .

Statute of Monopolies, 21 Jam., ch. 3 (1624) (Eng.) (greatly edited down).

108. See, e.g., LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 88-89 (1973) (asserting colonial reliance on the 1772 Philadelphia edition).

Monopolies are much the same offense in other branches of trade, that engrossing is in provisions: being a license or privilege allowed by the king for the sole buying and selling, making, working, or using, of anything whatever; whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before. These had been carried to an enormous height during the reign of queen Elizabeth; and were heavily complained of by sir Edward Coke, in the beginning of the reign of king James the first; but were in great measure remedied by statute 21 Jac. I. C. 3. which declares such monopolies to be contrary to the law and void; (except as to patents, not exceeding the grant of fourteen years, to the authors of new inventions;) . . . ¹⁰⁹

The Statute of Monopolies, furthermore, was known to the American Revolutionaries as the first victory against the royal prerogative¹¹⁰ by their ideological ancestors, the Whig opponents of the absolutist Stuart monarchs.¹¹¹ Sir Edward Coke, hero of the Statute of Monopolies fight, according to Blackstone, described monopolies as invasions of the ancient constitutional right of each person to practice any craft.¹¹² As a point of linguistic clarification, "monopolies" in this historical context is not a technical, economic doctrine about proven market power; it is a flexible term of disapproval applied to disliked trade regulation.¹¹³

Madison's 1792 essay *Property* seems to agree with Coke:

[A man] has an equal property in the free use of his

109. 4 BLACKSTONE, *supra* note 92, at 159-60 (footnotes and discussion of penalties omitted). Blackstone seriously oversimplifies the Statute of Monopolies. See Pollack, *Purveyance and Power*, *supra* note 88, at text accompanying notes 367-437.

110. See, e.g., CHARLES HOWARD MCILWAIN, *CONSTITUTIONALISM ANCIENT AND MODERN* 138 (1940).

111. See, e.g., GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 623 (paperback ed. 1990); LINDA LEVY PECK, *COURT PATRONAGE AND CORRUPTION IN EARLY STUART ENGLAND* 220 (1990) (asserting that fight against early Stuart "old corruption" and related monopolies was central to revolutionary thought).

112. See EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 183-84 (William S. Hein Co. 1986) (1798).

113. During the House of Lord's debate on the Statute of Monopolies, for example, Lord Haughton objected because "Monopolies, what, uncertyne. The punishment is greate." Henry Elsing, *NOTES OF THE DEBATES IN THE HOUSE OF LORDS, OFFICIALLY TAKEN BY HENRY ELSING, CLERK OF THE PARLIAMENTS, A.D. 1621*, at 104 (ed. Samuel Rawson Gardiner, 1879, Camden Soc'y Pub. No. 103). See also STEPHEN D. WHITE, *SIR EDWARD COKE AND "THE GRIEVANCES OF THE COMMONWEALTH," 1621-1628*, at 118-19 (1979) (flexibility of term "monopoly").

faculties and free choice of the objects on which to employ them.

....

That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations... What must be the spirit of legislation where a manufacturer of linen cloth is forbidden to bury his own child in a linen shroud, in order to favor his neighbor who manufactures woolen cloth; where the manufacturer and wearer of woolen cloth are again forbidden the economical use of buttons of that material in favor of the buttons of other materials!¹¹⁴

Madison's statement that each man has a right not to be denied the right to work at his chosen trade is a Located Lockian claim right not to be excluded. The Intellectual Property Clause allows this right to be overridden by temporary Inventors' Exclusive Rights, which Congress has legislated as patents.¹¹⁵ When an Inventor's Exclusive Right sunsets, the art taught by the expired patent enters the public domain. Madison's 1792 essay clearly asserts that each man individually has a right not to be excluded from practicing crafts in the public domain. Madison's statement is clear evidence that one Framers, at least, almost contemporaneously with drafting the Constitution, saw the public domain as a Lockian owned common. This is exactly the view of the public domain implied in the Supreme Court's early cases; a point I will discuss next.

In sum, the constitutional history of patents demands that we see the public domain as a Lockian owned common.¹¹⁶

114. Madison, *supra* note 67, at 599. The colonial view on the importance of banning monopolies was so strong that one scholar has argued that the ban is an unenumerated right protected by the Ninth Amendment. See Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Reexamined*, 31 EMORY L. J. 785, 801-02 (1982).

115. See 35 U.S.C. §§ 1-14.

116. This analysis is not foreclosed in reference to the Intellectual Property Clause by the Supreme Court's refusal to protect against non-intellectual property state restrictions on the job market. See, e.g., *The Slaughter House Cases*, 83 U.S. 36, 80-81 (1872) (denying Takings Clause attack on Louisiana statute limiting ability to butcher animals, despite plaintiffs' reliance on the Statute of Monopolies). Because of the Intellectual Property Clause, the federal government has a different role in relation to intellectual property than it has in relationship to other claimed "property" entitlements. See U.S. CONST. art. I, § 8, cl. 8. Property entitlements, generally, are creatures of state law. See, e.g.,

IV

Supreme Court Case Law: The Bargain Theory of Patents

The Supreme Court's classic cases on expired patents¹¹⁷ support my reading of the Intellectual Property Clause. These cases treat a patent grant as a contract-like bargain between the inventor and the public, a bargain in which the federal government's patent administrator is the public's agent.¹¹⁸ The patentee obtains a time-limited right to exclude others from making, using, or selling his invention. In return, the patentee discloses his invention to the public so that, at the end of the patent term, the public has the ability to practice the invention.

Contract terminology is used repeatedly in one of the Court's earliest patent cases,¹¹⁹ *Grant v. Raymond*:¹²⁰

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (in Takings Clause jurisprudence, the Court "traditional[ly] resort[s] to existing rules or understandings of [property rights] that stem from an independent source such as state law.") (internal quotations and citation omitted); *accord* City of Boerne v. Flores, 521 U.S. 507, 518 (1997) (under Section five of the Fourteenth Amendment, Congress has broad power to remedy state actions restricting life, liberty, and property, but Congress does not have power to redefine the substance of these rights).

117. See *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111 (1938); *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169 (1896); *Coats v. Merrick Thread, Co.*, 149 U.S. 562 (1893).

118. Many others have noted this bargain language. See, e.g., Douglas Y'Barbo, *Is Extrinsic Evidence Necessary to Decide Claim Construction Disputes?* (Part II), 82 J. PAT. & TRADEMARK OFF. SOC'Y 101, 133 n.44 (referring to "the familiar 'bargain theory of patents.'") (citation omitted).

119. On July 31, 2000, I conducted a search in WESTLAW database sct-old (which allegedly includes all Supreme Court cases before 1832) for cases using the word "patent." Most of the retrieved cases were about land patents or patents granting corporate charters. A few cases included references to patents of various types, but did not involve disputes concerning patents of invention. The following are the only cases before 1832 that did involve such disputes. *Pennock v. Dialogue*, 27 U.S. 1, 23 (1829) (holding that public use of invention before date of patent application voids patent; in one sentence using words implying bargain theory of patents, "There would be no quid pro quo - no price for the exclusive right or monopoly conferred upon the inventor for fourteen years."); *Keplinger v. De Young*, 23 U.S. 358 (1825) (mem) (discussing jury instruction on extent of exclusive rights of patentee; no language of contract between public and patentee); *Ex parte Wood & Brundage*, 22 U.S. 603 (1824) (construing patent statute's judicial procedure requirements; no contract language); *Gibbons v. Ogden*, 22 U.S. 1 (1824) (patent issues not discussed by Court; suit involved state patents on steamboats, but Court decided on basis of Commerce Clause); *Evans v. Eaton*, 20 U.S. 356 (1822) (mem) (holding that patent for improvement in a machine is void for failure to clearly explain the

[I]t cannot be doubted that the settled purpose of the United States has ever been and continues to be, to confer on the authors of useful inventions an exclusive right in their inventions for the time mentioned in their patent. It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made; and *to execute the contract fairly on the part of the United States*, where the full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved¹²¹

The communication of the discovery to the public has been made in pursuance of law, with the intent to exercise a privilege which is *the consideration paid by the public for the future use of the machine*.¹²²

The third section [of the statute] requires, as preliminary to a patent, a correct specification and description of the thing discovered. This is necessary in order to give the public, after the privilege shall expire, *the advantage for which the privilege is allowed*, and is the foundation of the power to issue the patent.¹²³

The Court's most recent cases continue to use the contract analogy. The patent system represents "a carefully crafted bargain," according to the Court in 1989,¹²⁴ and again in 1999.¹²⁵

nature of the improvement; not using contract language); *Evans v. Eaton*, 16 U.S. 454, 507 (1818) (mem) (granting new trial in patent infringement suit; using some language commonly used in contract cases: "The next object of inquiry is the intention of the parties The parties are the government, acting by its agents, and Oliver Evans."); *Evans v. Morehead*, 13 U.S. 199 (1815) (mem) (construing exception from damages in patent statute enacted for specific relief of Oliver Evans; failing to discuss any wider issues than statutory construction; no contract language); *Tyler v. Tuel*, 10 U.S. 324 (1810) (mem) (holding that assignee of less than full interest in a patent lacks standing to sue for infringement; no discussion of patentee's relationship to public; no contract language).

120. 31 U.S. 218 (1832).

121. *Id.* at 242 (emphasis added).

122. *Id.* at 244 (emphasis added).

123. *Id.* at 247 (emphasis added).

124. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150-51 (1989) ("The federal patent system thus embodies a carefully crafted bargain for encouraging the creation and disclosure of new, useful, and nonobvious advances in technology and design in return for the exclusive right to practice the invention for a period of years.").

125. *Pfaff v. Wells Electronics, Inc.*, 525 U.S. 55, 63 (1999) ("As we have often explained, most recently in *Bonito Boats* . . . the patent system represents a carefully crafted bargain that encourages both the creation and the public disclosure of new and useful advances in technology, in return for an exclusive

When a patent expires and the former patent holder asserts a trade dress right in some aspect of the formerly patented product's configuration, the question presented is the exact consideration exchanged in the patent bargain.

Four circuits who have reached this question have answered by invoking the trade dress doctrine of "functionality."¹²⁶ Let us consider *Marketing Displays* because that case is currently before the Supreme Court.

Marketing Displays, Inc. held utility patents on a wind-resistant sign. Competitor Traffix Devices waited until after the utility patents expired and then began marketing an almost identical product. Marketing Displays sued. The district court held that the expired patent barred a trade dress claim. The Sixth Circuit reversed and remanded. The circuit recognized that the issue was "whether a utility patent disclosure forecloses trade dress protection,"¹²⁷ but reduced that question to the trade dress issue of functionality. It ordered the trial court "to do a functional analysis of the trade dress unencumbered by any presumptions other than the ordinary burden of proof assumed by the plaintiff."¹²⁸ Functionality is a doctrine that prevents trade dress in features which should not be "monopolized" without proving the non-obviousness required to obtain patent protection. A product aspect is "functional" if "it is essential to the use or purpose of the article or if it affects the cost or quality of the article, that is, if exclusive use of the feature would put competitors at a significant non-reputation-related disadvantage."¹²⁹

If the consideration question is reduced to functionality, the bargain concept of patent almost evaporates. Every trade dress plaintiff needs to prove non-functionality, not just the holders of expired patents; only the holders of expired

monopoly for a limited period of time.").

126. See *Marketing Displays, Inc. v. Traffix Devices, Inc.*, 200 F.3d 929 (6th Cir. 1999), *cert. granted*, 120 S. Ct. 2715 (2000) (wind resistant road signs); *Midwest Indus., Inc. v. Karavan Trailers, Inc.* 175 F.3d 1356 (Fed. Cir. 1999) (trailers); *cert. denied*, 120 S. Ct. 527 (1999); *Thomas & Betts Corp. v. Panduit Corp.*, 138 F.3d 277 (7th Cir. 1998) (cable ties); *Sunbeam Prods., Inc. v. West Bend Co.*, 123 F.3d 246 (5th Cir. 1997) (stand mixers).

127. *Marketing Displays*, 200 F.3d at 939.

128. *Id.* at 940.

129. *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 165 (1995) (internal quotation marks and citations omitted).

patents, however, have received from the public the "consideration" of a "monopoly" term. Under this view, the "consideration" that the public received for the patent, therefore, is only the art disclosure in the patent documents. If manufacturing would have revealed the art details (as seems clear in the case of Marketing Display's signs), the public has received no consideration whatsoever from the patent holder.

The bargain is even more lopsided. Patentability does not require a showing of competitive need. Many product aspects can be patentable (i.e. useful, novel, nonobvious) and still not be trade dress functional (required for competition because no substitutes exist).¹³⁰ An applicant can obtain a utility patent, therefore, without showing its invention has trade dress "functionality," but can retain after the expiration of the patent any product detail which is not "functional."

The Tenth Circuit requires slightly more consideration from a patent holder. In *Vornado Air Circulation Sys., Inc. v. Duracraft Corp.*, that circuit held that the patent holder could not claim as trade dress anything that was "a significant inventive component of an invention covered by a utility patent."¹³¹ The circuit reached this conclusion without mentioning the Bargain Theory of Patents or relying on the Constitution.¹³²

In its classic cases on expired patents,¹³³ the Supreme

130. See *Vornado Air Circulation Sys., Inc. v. Duracraft Corp.*, 58 F.3d 1498, 1506 (10th Cir. 1995) ("Configurations can simultaneously be patentable, useful, novel, and nonobvious and also nonfunctional, in trade dress parlance.").

131. *Id.* at 1500.

132. See *id.* at 1505 n.15.

133. See *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111 (1938); *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169 (1896); *Coats v. Merrick Thread, Co.*, 149 U.S. 562 (1893). The Supreme Court has discussed closely related issues in other cases. See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) (federal patent "system" pre-empts state law barring plug molding of boat hulls); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) (patent preemption of state unfair competition claim on configuration of pole lamp; utility patent on lamp had earlier been declared invalid); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964) (same). Looking at the issue broadly, these pro-competition decisions are congruent with *Wal-Mart Stores, Inc. v. Samara Bros.*, 120 S. Ct. 1339 (2000) (Lanham Act protection of unregistered trade dress in product configurations requires a showing of secondary meaning) and in tension with *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159 (1995) (color alone is protectable as trade dress under the Lanham Act); *Two Pesos*,

Court demanded much more “consideration” from the patent holder. Let us look closely at the most famous case, *Kellogg Co. v. National Biscuit Co.*¹³⁴

Kellogg involved shredded wheat. The National Biscuit Company was the successor in interest to Henry D. Perky who invented this breakfast food. The product and process were protected by United States Utility Patent No. 548, 086 issued October 15, 1895 (the ‘086 Patent).¹³⁵ Long after expiration of the patent, National Biscuit sued competitor Kellogg under the theory of unfair competition. National Biscuit attempted to assert trademark rights in the words “shredded wheat” and trade dress rights in the pillow-shape of the marketed biscuit.¹³⁶ The Supreme Court refused to enforce either, yet never asked if the “pillow shape” was “a significant inventive component of [the] invention covered by [the] utility patent.”¹³⁷

The pillow shape was not mentioned in the ‘086 patent. The claims read:

1. A food or bread composed of superposed or massed layers or deposits of dry externally, rough, porous, sinuous threads or filaments of cooked whole wheat containing intermixed the bran, starch, and gluten of the entire berry, and which is absolutely free from leavening or raising material, or their products.
2. The process of reducing cereals for food consisting, first, in cooking the grain with salt, after it has been thoroughly cleaned, without destroying the whole berry form, second, partially drying the grain with constant agitation until its interior and exterior portions are of substantially the same consistency, and finally, compressing the grain to intimately commingle the outer or bran coats, in the form of porous, rough filaments or threads, substantially as described.¹³⁸

The descriptive portion of the patent asserted that “[t]he food as discharged from the rolls is ready for use without

Inc. v. Taco Cabana, Inc., 505 U.S. 763 (1992) (inherently distinctive trade dress is protectable under the Lanham Act without secondary meaning); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) (trade secret is not preempted by federal patent law). This article applies the Lockian owned public domain only where the argument is most compelling, to trade dress claims in expired utility patents.

134. 305 U.S. 111 (1938).

135. *Id.* at 112; U.S. Patent No. 548,086 (issued October 15, 1895).

136. *See Kellogg*, 305 U.S. at 112.

137. *Id.* at 123.

138. U.S. Patent No. 548,086 (issued October 15, 1895) at p.2, ll.23-42.

further cooking, or it can be shaped for baking in various ways."¹³⁹

The Supreme Court opinion could be read as partially, at least, depending on the "functionality" of the pillow shape: "[m]oreover, the pillow-shape must be used [by competitors] for another reason. The evidence is persuasive that this form is functional – that the cost of the biscuit would be increased and its high quality lessened if some other form were substituted for the pillow-shape."¹⁴⁰

The Supreme Court mispoke. The only mention of functionality in the decisions below is the trial court's quote from a different case involving the same product, *Shredded Wheat Co. v. Humphrey Cornell Co.* The *Humphrey* circuit court is quoted as giving several reasons for supporting the defendant and then continuing:

Moreover, I think that the form and size of the biscuit as always made by the complainant are functional, and that imitation of these features is not evidence of unfair competition. The form evidently tends to strengthen a product made out of such fragile material and the size is apparently the best fitted for use as a breakfast food on a saucer.¹⁴¹

This quote, however, is from the *dissent* in *Humphrey*. The *Humphrey* majority opinion, by no other than Judge Learned Hand, says that the form of the biscuit was dedicated to the public by the expiration of a design patent.¹⁴² As for findings of fact about the "functionality" of the pillow shape, the *Humphrey* District Court said the opposite:

[T]here was then, and for quite a time previous thereto had been, other forms of shredded wheat biscuit, which could be and were easily identified from the product of the plaintiff

. . . .

The visual appearance of the defendants' product . . . [was] adopted by the plaintiff, not because of any inherent or functional advantage or value resulting therefrom, but purely as a matter of accident resulting from the size and shape of the rolls of the plaintiff's machinery from which it was discharged ready for use. Indeed there is an apparent disadvantage in the shape and size of the product as made

139. *Id.* at p.1, ll.96-98.

140. *Kellogg*, 305 U.S. at 121-22.

141. *Kellogg*, 24 U.S.P.Q. 138, 142 (D. Del. 1935) (*quoting* *Shredded Wheat Co. v. Humphrey Cornell Co.*, 250 F. 960, 967 (2d Cir. 1918)).

142. *See* *Humphrey*, 250 F. at 964.

by the plaintiff and copied by the defendants¹⁴³

Other than this disingenuous quote, the *Kellogg* district court said nothing about functionality. On appeal, the Third Circuit originally affirmed judgment for defendant because of the donation to the public domain made by the expired patents.¹⁴⁴ On rehearing, the Third Circuit reversed without mentioning functionality. Nor was functionality mentioned when the mandate was clarified to stiffen the wording of the injunction against the defendant.¹⁴⁵ When *Kellogg* reached the Supreme Court the parties were still disputing functionality – with neither claiming support from the courts below.¹⁴⁶ “Functionality,” furthermore, is not mentioned in the Court’s earlier cases holding that on the expiration of a patent the article manufactured can be made by competitors.¹⁴⁷

I read *Kellogg* as firmly based on the dedication of patented material to the public – the Bargain Theory of Patent. What was dedicated, furthermore, was neither the claims of the patent, nor the inventive aspect of the patent, but rather “the right to make the article as it was made during the patent period” as well as “the right to apply thereto

143. *Shredded Wheat Co. v. Humphrey Cornell Co.*, 244 F. 508, 512 (D. Conn. 1917), *aff’d with modification*, 250 F. 960 (2d Cir. 1918). I would have argued that the shape was functional because it was less expensive; the product could be marketed without reshaping after it came out of the rollers. The court, however, did not say this. One additional point, under the then-current doctrine of *collateral estoppel*, since no mutuality of estoppel was possible, the holding in *Humphrey* was not binding on the plaintiff in *Kellogg*, even though the case seemingly involved its predecessor in interest. See Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction* §§ 4462, 4464 (2d ed. 1987) (explaining doctrine of mutuality of estoppel and the timing of its demise).

144. See *Kellogg*, 28 U.S.P.Q. 179, 179 (3d Cir. 1936), *affirming* 24 U.S.P.Q. 138 (D.Del. 1935).

145. See *Kellogg*, 91 F.2d 150 (3d Cir. 1937), *modified by*, 96 F.2d 873 (1938).

146. Compare Brief for Petitioner at 57-66, 108-12, *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111 (1938) (Nos. 2 & 56) (arguing form is functional) with Brief for Respondent at 19-32, 40-42, *Kellogg*, 305 U.S. 111 (arguing form is not functional). The design patent also seems extraneous to the Supreme Court’s decision because it was held invalid. See *Kellogg*, 305 U.S. at 118 n.4. The *Humphrey* district court, furthermore, saw the design patent as protecting the “fibrous interstitial appearance” of the biscuit, not its shape. *Humphrey*, 244 F. at 514. The Court did, however, hold that material covered by an expired design patent enters the public domain. See *Coats v. Merrick Thread Co.*, 149 U.S. 562 (1893) (refusing unfair competition claim).

147. See *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169 (1896); *Coats v. Merrick Thread Co.*, 149 U.S. 562 (1893).

the name by which it had become known,”¹⁴⁸ and “the good will of the article.”¹⁴⁹ Since the Court has recently held that trade dress in unregistered product configurations requires a showing of secondary meaning,¹⁵⁰ and “secondary meaning” is the “good will of the article,” *Kellogg* now supplies two reasons for insisting that the holder of an expired utility patent may not use trade dress theory to exclude others from marketing a product identical in appearance to the ones sold under patent protection.

The size of the consideration demanded of the patent holder is not inequitable. The “good will” and “secondary meaning” were created in a market emptied of competition by the patent. The patent holder, furthermore, still retains significant first mover advantages. No other market entrant can use his well established brand name on the product, label it as “the original,”¹⁵¹ or publicly claim longer experience with the product.

The size of the consideration demanded of the patent holder does not rest only on established precedent. The Supreme Court’s measure of the consideration matches the thesis of this article, despite the fact that the Court has never mentioned a Lockian owned public domain, or discussed Madison’s essay *Property* as a historical connection between the Intellectual Property Clause and this owned public domain.

In a Lockian owned public domain, each member of the rights-bearing community (i.e. all persons in the United States) have an inalienable right not to be excluded. The Intellectual Property Clause allows Congress to create only time-limited rights to exclude. When an Inventor’s Exclusive Right (IER) ends, therefore, the default position returns – the public has rights not to be excluded. The clause limits federal power for the sake of individual rights. Congress may not bypass this limit by using the more generalized Commerce

148. *Kellogg*, 305 U.S. at 111.

149. *Id.* at 122.

150. See *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 120 S. Ct. 1339 (2000).

151. *Kellogg* violated this rule of truthfulness to the outrage of the Third Circuit. See *Kellogg*, 91 F.2d at 155 (“[The] defendant not only adopted the name and form of plaintiff’s product, but also claimed that its product was the original and by implication that the plaintiff’s was an imitation.”).

Clause power – for example by using the Lanham Act.¹⁵² The states may not grant greater rights because such action would undermine the federal “patent system.”¹⁵³

Looking at Madison on *Property* we also reach the same result. Madison adopted Blackstone’s explanation of Coke’s position: the ancient constitution of English person’s liberty includes a right to engage in one’s chosen business activity. Short-lived patents for inventors are an exception.¹⁵⁴ Anything else is a tyrannical “monopoly.” “Monopoly” in this context is not a technical term of art requiring a showing of market power. Any disliked limit on competition will do. A patent is a temporary right to oust others from the freedom to engage in a commercial activity. The insult to freedom is not conditioned on the anachronistic concept of market power.

V

Conclusion

Five circuits have treated Supreme Court case law as if it were outmoded. This article has demonstrated that the Court’s case law barring trade dress protection for any aspect of a product earlier produced under shelter of a utility patent is the rational result of a Lockian owned public domain, an interpretation congruent with the historical background of the Intellectual Property Clause. The Supreme Court should use *TrafFix Devices, Inc. v. Marketing Displays, Inc.* to reaffirm the doctrines enunciated in *Kellogg*.

152. See *Railway Labor Executives’ Ass’n v. Gibbons*, 455 U.S. 457, 471 (1982) (Congress may not bypass the “uniformity” requirement in the Bankruptcy Clause by appealing to the Commerce Clause). For a more detailed discussion of this point, see Pollack, *Unconstitutional Incontestability*, *supra* note 97, at 270-74; Malla Pollack, *The Right to Know?*, 17 CARDOZO AELJ 47, 55-66 (1999).

153. *Bonito Boats*, 489 U.S. at 977-78; see also Pollack, *Unconstitutional Incontestability*, *supra* note 97, at 300-26 (arguing that states are bound by the Intellectual Property Clause).

154. The only exception mentioned in the colonial Blackstone.
